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No. 88-991

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

U.S. Roofing Corporation,

Petitioner

v.

Owens-Corning Fiberglas Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER U.S. ROOFING CORPORATION

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REPLY BRIEF FOR PETITIONER
U.S. ROOFING, INC.

I. THE SUBSTANCE OF THE QUESTION WARRANTS REVIEW.

The Respondent makes light of the Petitioner's stated thesis that, left stand, the Appellate Decision in the present case disenfranchises all Intervenors. This exact

wholesale disestablishment, however, was once understood and prevented. It needs a timely reaffirmation.

"If we were to hold that an intervenor did not have the right to raise questions as to the merits of a decree, it would make meaningless his right to intervene." (Dawson v. Pastrick, 600 F.2d 70, 75 (1979), emphasis added.)

Whereas Rule 24 of the Federal Rules of Civil Procedure, which deals with intervention, was duly enacted by the United States Congress, a decision "making meaningless" one of these Rules is plainly worthy of the attention of the Supreme Court.[1]

The Respondent's Brief in Opposition clearly demonstrates the nature and the scope

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[1] This compares to a lower court ruling that a law enacted by congress is unconstitutional.

of the disenfranchisement represented by the Appeals Court ruling in this case. Neither the Appellate Ruling nor the Respondent's brief does - or could - explain how intervenor rights might survive in the wake of this ruling.

Intervenors invariably arrive last in court. To make an intervenor's presence at the beginning a prerequisite for standing is a complete repudiation of all that Rule 24 stands for.

Both the Appeals Court and the Respondent say that the Petitioner "misses the point." (Appendix A to Petition at 10, Brief in Opposition at 7) The point has moved somewhat between the two uses of this phrase, but it is still unmistakably onerous. Unlike the Appeals Court, the Respondent admits that the Petitioner is a party to the proceedings in

the district court.[2] Both claim, however, that intervention excludes the intervenor from the cause of the proceedings and therefore has no rights. (Brief in Opposition, fn 6 at 6.)

This distinction is simply too ludicrous. The second consent decree formally defined an unnamed Acquirer. Upon emerging from a formal selection process, this Acquirer was given rights and responsibilities - the right to

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[2] "USR ... was neither a party to the Final judgment, nor to any consent agreement or order." (Petition, Appendix A at 11.) Of these orders, three directly followed the intervention. (Petition, Appendix C at 28.)

Moreover, the Appeals court notes: "Owens-Corning's obligation to divest those plants ... depended on the application and interpretation of the 'qualified purchaser' criteria in the court's Final Judgment." (Petition, Appendix A at 11, emphasis added.)

These two processes were the exact focus of the de novo proceedings in which the Petitioner intervened and in which its interests were adversely affected. Yet the Appeals Court continued:

"When the FTC failed to appeal ... that was the end of the matter." (Petition Appendix A at 11.)

take title to certain plants subject to a responsibility to prove its capacity, intent and remedy (Petition, Appendix F Sec VI (F), 11-14).

Having been selected by the Trustee and FTC, the Acquirer became a formal party to this case through intervention. It was done in two stages: a first intervention for limited purpose and second without limitation. Because its rights, responsibilities and very definition arose directly from the Final Judgement at the core of the proceedings to which it had intervened, the Acquirer clearly also became a party to this decree once the intervention's limitations were deliberately and completely removed.[3]

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[3] In United States v. LTV Corp., 746 F.2d 51 (1984), this was simply explained. Here, an appeal of an anti-trust case had been attempted without prior intervention. The court plainly said to the third party appellant: "... the general rule requires it

That this was proper had been established by precedent:

> "[W]here the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion." (Cascade Natural Gas Corp. v. El Paso Natural Gas Co. 386 U.S. 129, 135 (1967), citing Missouri-Kansas Pipe Line Co. v. United States, 213 U.S. 502, 506 (1940), emphasis added.)

In supporting the Appeals Court's ruling at question, the respondent claims that when the FTC did not appeal, there was no "case or controversy." (Brief in Opposition at 9.)

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to first seek to become a party to the proceedings before taking an appeal." (Id. at 55) Also noting: "Parties to the record include the original parties and those who have become parties by intervention, substitution or third-party practice." (Id. at 53 citing 9 Moore's Federal Practice Sec. 203.06 at 3-20 (1980).)

This is arguable.

The controversy involves a) the application by the District Court of an obsolete interpretation of the principle of mutuality to declaring that conditional contracts are illusory and b) findings of fact by the district court reversing every single substantial finding by the court's own trustee and the representative of the people of the United States in antitrust matters, the F.T.C.[4]

The matter of there being a case and jurisdiction now depends on the value given to

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[4] In Respondent's footnote 9 at 9, it claims that "... petitioner has never filed an intervenor complaint setting forth any justiciable case or controversy upon which it could assert the jurisdiction of the courts." The meaning of this is not clear. The petitioner outlined these matters following the procedure manual of the Cincinnati appeals court. If some paperwork had not been completed properly, surely the matter would have surfaced before the Respondent's final footnote.

its intervention rights by this Court.

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In its brief, the Respondent could not resist pointing out to the Court that U.S. Roofing's first submission of its Petition was returned by the Clerk because it did not conform to format rules. It is true that U.S. Roofing is proceeding with minuscule resources compared to the Respondent and is therefore no where near as polished. No disrespect was intended. Furthermore, the Court's allowance of resubmission was deeply appreciated.

The respondent directly proceeds to address the issue of its having hired the District Judge's nephew as local counsel in this case. In a highly indignant footnote, it claims that the nephew, a Toledo attorney, served as local counsel only while the case was temporarily across the state in the Akron court of Judge Sam Bell. This is not

confirmed by the paper trail.

Richard Walinski's name is listed as "counsel for defendant" in a "Memorandum of Owens-Corning Fiberglas Corporation in Opposition to 'Motion for Extension of Time to Complete Ongoing Negotiations' entered "In the United States District court for the Northern District of Ohio Western Division." (emphasis added)

It happened at that time that Judge Walinski, driving while intoxicated, had an accident in which a woman, a former Owens-Corning employee, was seriously injured. As this was the Judge's second DUI accident in a year, he should have gone to jail under Ohio's strict drunk driving law. Instead, he enrolled himself for a month in a Minnesota alcoholism treatment clinic. As a result of this incident, both the nephew's memorandum and the case then went to Akron, Northern

District of Ohio Eastern Division, until Judge Walinski returned.

The Respondent uses the term "too outrageous to be ignored." The Petitioner agrees but feels the outrage is not only misdirected but an imposition. Owens-Corning Fiberglas has no ethical standing to justify its indignation; it has repeatedly acted in a manner unbefitting a major corporation in this case.

The Petitioner would also like to reply to the Respondent's accusation that this affair was raised for "innuendo." The purpose was to illustrate why the Petitioner reasonably sought protection of its appeal rights through Rule 24.[5] If there had been no apparent

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[5] Even so, the Petitioner raised the issue with difficulty. The world we live in tends to be kinder to those who commit unspeakable acts than it is to those who speak of them. In the end, the decision to proceed was based on the belief that an informed Court

indiscretion, there would have been no intervention.

II. THE DECISION BELOW RESISTS THE RESPONDENT'S ATTEMPTS TO SQUARE IT WITH DECISIONS OF THIS COURT AND OTHER APPEALS COURTS.

In attempting to support its claim that the Appeals Court decision in this matter is

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is generally superior to one that is deprived of information.

Favoritism, though explicitly contrary to the charter of our legal system, is not a formal concern of either this Petition or of the proceedings in the Appeals Court. U.S. Roofing feels that, if allowed, it can show the Appeals Court that Judge Walinski's findings of fact are clearly erroneous and his ruling on mutuality is contrary to precedent.

Informally, however, this apparent and open display of favoritism is a deep concern of the Petitioner. The President of the United States has currently made the establishment of ethical standards an immediate national priority. Either the courts and major corporations of this country are going to take a leadership position in this process or not. The Petitioner's opinion is that they should.

no departure from precedent, the Respondent cites a number of cases that, through their lack of direct relevance, indirectly contradict its position:

First, Diamond v. Charles, 476 U.S. 54 (1986), is noted. Here, a doctor - possessing no more than his conscientious objection to abortion and a daughter of child-bearing age - sought appeal of a district court judgment. Dr. Diamond's obvious lack of a "direct stake in the outcome," (Id. at 62, citing Sierra Club v. Morton, 405 U.S. 727, 740 (1972).) clearly did not satisfy Article III. Justice O'Connor went further stating that Diamond "... was not a proper intervenor." (Id. at 73.)

Diamond serves to clarify that U.S. Roofing deserves to be heard. U.S. Roofing's interest in the disposition of these roofing plants is indisputable. There is literally a

"concrete adverseness" (see Baker v. Carr, 369 U.S. 186, 204 (1962)) present in the question of the right to title to the physical assets at the center of this case. Moreover, U.S. Roofing has many thousands of dollars at stake in appraisal and professional fees.

The exact lines that must be crossed for Article III and Rule 24 satisfaction have never been explicitly defined; but just as clearly as Diamond had no stake, U.S. Roofing has one and should be allowed its appeal.

Upon examination, every other case cited by the Respondent can also be seen to damage its contention that the Appeals Court decision in this case is consistent with precedent.

Take Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975). In a consent decree, Blue Chip was required to offer shares of its stock to a group of retailers. Manor Drug claimed that it was

then delivered a prospectus that was so pessimistic as to be materially misleading. Therefore, Manor did not buy the Blue Chip stock.

The case was a test of the Birnbaum Rule.[6] The Rule was meant to forestall the possibility of torrential litigation by armchair claimants who might read the statements of frauds in "their local newspapers" (Id. at 754). The point of the Blue Chip case was that Manor had not taken the one step needed to allow it access to the courts.

Contrast this with U.S. Roofing which did everything required to become the Acquirer defined in the Final Judgement and to become a

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[6] From Birnbaum v. Newport Steel Corp., 193 F.2d 461 (1952), which states that only persons who are purchasers or sellers of securities may bring action under Sec. 10(b) of the Securities Exchange Act of 1934 or SEC Rule 10b-5.

party to this case.

Next, the Respondent's cite of Chief Justice Taft's humorously delivered opinion in Buckeye Coal v. Hocking Valley Railway, 269 U.S. 42,49 (1925) adds further damage to its position. Here, an unlawful combination was broken up by the District Court. The new company, Buckeye, seeking to get out of a two cent per ton royalty to be paid to its former parent (and a minor lien against its coal fields), brought an action showing "an embarrassment of reasons" (Id. at 47.) for failure.

The line the Respondent selected from Buckeye proves its irrelevancy. U.S. Roofing, though in sympathy with the public interest, has never claimed to speak for it. This is an important distinction justifying the intervention and the appeal. U.S. Roofing seeks its rights as Acquirer, recognized as

Intervenor and adversely affected. In fact, both the Appeals Court and the Respondent note that U.S. Roofing was motivated by "private gain" (Petition Appendix A11, Respondent's Opposition at 6). Moreover, neither could cite a single instance where the Petitioner propounded on the anti-trust aspect of the original case or made the slightest pretense of speaking for the public interest.[7]

Another dilemma created by the Respondent's Opposition involves the citation of a pair of cases with stark contrast to USR v. OCF: Dahl v. Cooper, 448 F.2d 17, 20 (9th Cir. 1971) and United States v. American Society of Composers, Authors and Publishers, 341 F.2d 1003, 1008 (2d Cir.), cert. denied, 440 U.S. 981 (1979).

In both cases cited, an enraged

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[7] Certainly, a stronger voice than U.S. Roofing's is required for such a job.

corporation sought to force another's compliance with an F.T.C. consent decree. Enforcement, however, is the Government's job under Section 15(1) of the FTC Act, 15 U.S.C. Sec 45(1).

Indeed, when Owens-Corning failed to sell the plants it had promised the Government it would divest, the F.T.C. did properly seek enforcement of its consent decree in District Court under Section 15(1). Through the process of that legitimate enforcement, U.S. Roofing was later legitimately allowed to enter this case.[8]

All of the cases cited by the Respondent

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[8] Incredibly, the Respondent maintains that the "... (p)etitioner admits this action arose out of an action brought by the FTC pursuant to Section 15 (1)..." (Opposition at 9, emphasis added) The Respondent does not explain, however, why Owens-Corning's deliberate dishonesty in its dealings with the Federal Government, punished by an $800,000 fine, should require such a confession by the Petitioner.

refute its central thesis. Furthermore, precedent is resplendent with direct affirmation of the Petitioner's position:

1. Maine v. Taylor, 106 S.Ct. 2440, 2447 (1986), citing Bryant v. Yellen, 447 U.S. 352, 368 (1980) and Diamond v. Charles 106 S.Ct. 1697, 1707 (1986). "We previously have recognized that intervenors in lower federal courts may seek review in this Court on their own, so long as they have 'a sufficient stake in the outcome of the controversy' to satisfy the constitutional requirement of genuine adversity."

2. NL Industries v. Secretary of the Interior, 777 F.2d 433, 436 (9th Cir. 1985), citing Shaff v. United States, 695 F.2d 1138, 1140 n.1 (9th Cir.), cert. denied, 464 U.S. 821 (1983) and Cerro Metal Products v. Marshall, 620 F.2d 964, 969 (3d Cir.1980). "In determining whether an intervenor may

subsequently appeal from a decision not being appealed by one of the parties in the district court, the test is whether the intervenor's interests have been adversely affected by the judgment."

3. Matter of Wildman, 793 F.2d 157, 159-160 (7th Cir. 1986), citing Fed R. Civ. P. 24(a) and United States v. 36.96 Acres of Land, 754 F.2d 855, 858, 859 (7th Cir.1985). "Were we viewing the case from its outset we might agree that Feiger had no standing to enter the suit ... (h)owever, the Bankruptcy Court determined that Feiger had standing when it granted his petition to intervene."

CONCLUSION

Intervention is an important, ancient civil right. The appeals court decision makes it meaningless.

Owens-Corning's arguments around the

periphery of this problem are empty: a) U.S. Roofing clearly had enough at stake for Article III standing, b) U.S. Roofing was not attempting to either represent the public interest or enforce antitrust law, and c) U.S. Roofing was not attempting to enforce a consent decree to which it had not become a party.

The Final Judgment defined the Petitioner and gave it rights. Prior to the appellate decision, Rule 24 gave it the additional right to appeal. But the Appeals Court shredded all of these when it said this " ... was a matter in which a private individual such as USR had no independent rights." (Petition, Appendix A at 10.)

This ruling is clearly inconsistent with precedent. Moreover, the denial of injunctive relief is not just.

Respectfully submitted,

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